COMTEL TELCOM ASSETS LP d/b/a
EXCEL TELECOMMUNICATIONS

Exhibit 1 to April 29, 2010 Ex Parte Letter

(WC Docket Nos. 01-92, 10-82)
(CC Docket No. 96-262)

EXCERPTS FROM HYPERCUBE PLEADINGS

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

HYPERCUBE TELECOM, LLC, (U-6592-C), Complainant,	)	
v.	)	C.09-5-009
LEVEL 3 COMMUNICATIONS, LLC (U-5941-C), Defendant.	)	

HYPERCUBE TELECOM, LLC'S OPPOSITION TO LEVEL 3 COMMUNICATIONS, LLC'S MOTION TO DISMISS OR STAY THE COMPLAINT OF HYPERCUBE TELECOM, LLC DUE TO PENDING FCC PROCEEDING

Jennifer Terry
Arent Fox LLP
Gas Company Tower
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013
Tel: 213.629.7400
Fax: 213. 629.7401
terry.jennifer@arentfox.com

Michael B. Hazzard
Joseph P. Bowser
Arent Fox LLP
1050 Connective Ave, NW
Washington, DC 20036-5339
Tel: 202.857.6029
Fax: 202.261.0035
hazard.michael@arentfox.com
bowser.joseph@arentfox.com

Dated: July 16, 2009

Counsel for Hypercube Telecom, LLC

into the flow between the CMRS carrier and the ILEC tandem transit provider" [Level 3 Preemption Petition at 1] to perform 8XX database dips and deliver 8XX calls).

Level 3's Toll Free Inter-Exchange Delivery Service is the same service that Hypercube provides to Level 3 pursuant to Hypercube's intrastate access tariff (and for which Level 3 has disputed 100% of Hypercube's invoices since November 2007). Level 3's decision to dispute 100% of the charges owed to Hypercube at the very same time that Level 3 was rolling out – and *defending before other state public service commissions* – a directly competing product offering is an outrageous exercise of self-help that Hypercube seeks to put an end to through this case.

III. EVEN TAKEN IN THE LIGHT MOST FAVORABLE TO LEVEL 3, LEVEL 3'S PREEMPTION PETITION WOULD HAVE PROSPECTIVE EFFECT ONLY

As described above, through its filing, Level 3 is attempting to convert a dispute between two co-carriers into some "industry-wide" issue. By its terms, however, Level 3's Preemption Petition is inappropriate as it urges the FCC to: (i) adopt a new rule defining a new class of carrier known in Level 3's parlance as an "Inserted CLEC," and (ii) preempt state commission authority over access calls that originate and terminate in the same state. Of course, before the FCC can adopt new rules or preempt longstanding state commission authority through a preemptive rule, the FCC would have to go through a "notice and comment" procedure, as required by the federal Administrative Procedure Act. To date, the FCC has undertaken no such effort. Level 3 never claims otherwise.

Level 3's petition is entirely premised on the Commission's adoption of a new class of carrier, which Level 3 terms an "Inserted CLEC." Level 3 Preemption Petition at 1. Level 3 defines "Inserted CLEC" as "CLECs that are retained by CMRS carriers and inserted into the flow between the CMRS carrier and the ILEC tandem transit provider for reasons other than

efficient routing or interconnection."[7] Level 3 also provides a diagram at Attachment 2 describing an "'Inserted CLEC' call flow. *See* Level 3's Petition, Attachment 2, Call Flow Diagram, attached hereto as Ex. 3. Remarkably, this call flow diagram originated in Level 3's (not Hypercube's) intrastate access tariffs, where Level 3 describes its product offering, "Toll Free Inter-Exchange Delivery Service." *See* Ex. 1, Appendix D to the White Paper; *see also* Ex. 2, Level 3's Idaho Call Flow Diagram. This clearly demonstrates that Level 3 believes that it is itself the quintessential "Inserted CLEC" about which it now bitterly complains. Nevertheless, the term "Inserted CLEC" has never been uttered, let alone adopted, by the FCC or any other commission.

Level 3 also seeks to have the FCC declare – for the very first time – that section 332(c)(3) of the federal Communications Act "preempts the application of intrastate originating access tariffs to wireless originated toll-free calls when transit is provided by an Inserted CLEC, such that the FCC's CLEC access charge tariffing rules apply to all wireless-originated toll-free traffic handled by the Inserted CLEC." *See* Level 3 Preemption Petition at 1-2. Again, the FCC has never adopted Level 3's construction of section 332(c)(3), and Level 3 does not assert otherwise.

Accordingly, any action that the FCC might take in response to Level 3's Preemption Petition would require rulemaking proceedings. These new rules would have prospective effect only, rendering Level 3's request for this agency to stay its hand even more inappropriate, as the parties would wait years (if not forever) for the FCC to take prospective action, leaving this outstanding collection dispute untouched. *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) ("the Administrative Procedure Act generally

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[7] Level 3 Preemption Petition at 1.

contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when, on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect.") (citing, *inter alia*, 5 U.S.C. §§ 551(4)-(7), 553, 554); *see also Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) ("A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint or rate prescription proceeding. Refunds from lawful tariffs are 'impermissible as a form of retroactive ratemaking.' Remedies against carriers charging lawful rates later found unreasonable must be prospective only." (*quoting ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002))).

The FCC's two principal rulemakings on CLEC access charges have both been prospective rulings, and the FCC's ruling on "intermediate carrier" access charges was issued, at least in part, in response to another Petition for Declaratory Ruling (that, unlike Level 3's petition, the FCC actually sought comment on). *See In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9948 ¶ 59 n.131, 2001 WL 435698 (2001) ("we conclude, on a prospective basis, that CLEC access rates will be deemed to be reasonable if they fall within the declining safe harbor that we have established"); *In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9117-18 ¶ 17 & n.60, 2004 WL 1103977 (2004) ("This new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis.") (citing 5 U.S.C. § 551(4); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Thus, changes to the FCC's interstate access charge system, not

surprisingly, have applied prospectively, not retroactively. The FCC has never preempted the intrastate access charge system.

At bottom, there is no basis in the FCC's existing rules for Level 3's "Inserted CLEC" concept. Any such rules would be the product of rulemaking proceedings, and not of a declaratory ruling, as confirmed by the FCC's decision to not resolve Level 3's Petition on its own terms and instead place the Petition in two rulemaking proceedings. And, again, any new FCC rules would have prospective, not retrospective, application. Accordingly, Level 3's Preemption Petition provides no basis for delaying this proceeding.

IV. LEVEL 3'S MOTION DOES NOT ESTABLISH THAT IT IS ENTITLED TO HAVE THESE PROCEEDINGS DISMISSED OR STAYED

A. Level 3's State Preemption Claim Is Plainly Erroneous

Level 3's Preemption Petition should give this Commission no pause because it is based on plainly erroneous application of law and a distortion of the facts. First, Level 3 argues that Commission action may be preempted by federal law. Section 332(c)(3) of the federal Communications Act limits the ability of states to regulate charges assessed by CMRS providers. 47 U.S.C. § 332(c)(3). Level 3's Motion (and its other papers), however, never identifies any charge by any CMRS carrier that has been, is being, or would be regulated by this Commission. Moreover, limits on the state commissions' authority to regulate CMRS charges (which are not even at issue here), do nothing to change the plain fact that calls that originate and terminate within a state are – and always have been – *jurisdictionally intrastate*. And when local exchange carriers ("LECs") provide access service for intrastate calls, LECs are permitted to charge intrastate access charges to interexchange carriers pursuant to their intrastate access tariffs, which are regulated by the relevant state commission, not the FCC.

HYPERCUBE TELECOM, LLC
MARCH 17, 2009

DOCKET 37599

COMPLAINT OF HYPERCUBE TELECOM, LLC AGAINST LEVEL 3 COMMUNICATIONS, LLC AND REQUESTS FOR WAIVER OF PROC. R. 22.242(C)	§ § § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

OPPOSITION OF HYPERCUBE TELECOM, LLC TO LEVEL 3 COMMUNICATIONS, LLC'S MOTION TO DISMISS HYPERCUBE'S FIRST AMENDED COMPLAINT

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Level 3's tariffed Toll Free Inter-Exchange Delivery Service is the same service that Hypercube provides to Level 3 pursuant to Hypercube's intrastate access tariff (and for which Level 3 has disputed 100% of Hypercube's invoices since November 2007). Level 3's decision to dispute 100% of the charges owed to Hypercube at the very same time that Level 3 was rolling out – and *defending before other state public service commissions* – a directly competing product offering is an outrageous exercise of self-help that Hypercube seeks to put an end to through this proceeding. Level 3's FCC Filing is no barrier and is undoubtedly simply an eleventh-hour effort by Level 3 to avoid Hypercube's charges.

D. Even Taken In The Light Most Favorable To Level 3, Level 3's FCC Filing Would Have Prospective Effect Only

As described above, through its FCC Filing, Level 3 is attempting to convert a dispute between two co-carriers into an "industry-wide" issue. By its terms, however, Level 3's FCC Filing is inappropriate as it urges the FCC to: (i) adopt a new rule defining a new class of carrier known in Level 3's parlance as an "Inserted CLEC," which would presumably encompass Level 3 and its own Toll Free Inter-Exchange Delivery Service (and TelCove's competing offering); and (ii) preempt state commission authority over access calls that originate and terminate in the same state. Of course, before the FCC can adopt new rules or preempt longstanding state commission authority through a preemptive rule, the FCC would have to go through a "notice and comment" procedure, as required by the federal Administrative Procedure Act. To date, the FCC has undertaken no such effort. Level 3 never claims otherwise.

As noted above, Level 3's FCC Filing is entirely premised on the FCC's adoption of a new class of carrier, which Level 3 terms an "Inserted CLEC." FCC Filing at 1. The FCC has not adopted Level 3's new carrier class. Level 3 also seeks to have the FCC declare – for the very first time – that § 332(c)(3) of the federal Communications Act "preempts the application of

intrastate originating access tariffs to wireless originated toll-free calls when transit is provided by an Inserted CLEC, such that the FCC's CLEC access charge tariffing rules apply to all wireless-originated toll-free traffic handled by the Inserted CLEC." *See* FCC Filing at 1-2. Again, the FCC has never adopted Level 3's construction of § 332(c)(3), and Level 3 does not assert otherwise. And given the recent *North County Order* described above, it is unlikely the FCC will ever do so. Further, such a declaration by the FCC would preempt Level 3's competing intrastate offering and those of others in Texas, including Sprint and Verizon.

Accordingly, any action that the FCC might take in response to Level 3's FCC Filing would require rulemaking proceedings, which may explain why the FCC simply filed Level 3's FCC Filing away in its two long-standing intercarrier compensation reform rulemaking dockets. Any new rules would have prospective effect only, rendering Level 3's request for this Commission to stay its hand even more inappropriate, as the parties would wait years for some remote possibility that the FCC might take *prospective* action, leaving this outstanding collection dispute unresolved.[22] Level 3 has acknowledged as much in another proceeding involving similar issues. *See* Deponent Level 3 Communications, Inc.'s Motion to Quash Subpoena *Ad Testificandum* at 10 n.5, *Hypercube, LLC et al. v. Comtel Telcom Assets LP*, 1:10-cv-00513-CMA-CBS (D. Col. filed March 4, 2010) (attached hereto as Exhibit 10) ("Unless and until [Level 3's FCC Filing] is granted, Level 3 (and Excel) have every right to engage in all the same

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[22] *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) ("the Administrative Procedure Act generally contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when, on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect.") (citing, *inter alia*, 5 U.S.C. §§ 551(4)-(7), 553, 554); *see also Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) ("A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint or rate prescription proceeding. Refunds from lawful tariffs are 'impermissible as a form of retroactive ratemaking.' Remedies against carriers charging lawful rates later found unreasonable must be prospective only.") (*quoting ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002)).

practices as Hypercube."). Thus, Level 3 itself understands that its FCC Filing, if granted, would only have prospective effect. Level 3 also acknowledges that Hypercube's service is perfectly legal because there is no current prohibition.

FCC precedent confirms the prospective nature of any relief the FCC could potentially grant based on Level 3's FCC Filing. The FCC's two principal rulemakings on CLEC access charges have both been prospective rulings, and the FCC's ruling on "intermediate carrier" access charges was issued, at least in part, in response to another Petition for Declaratory Ruling (on which, unlike Level 3's petition, the FCC actually sought comment).[23] Thus, changes to the FCC's interstate access charge system, not surprisingly, have applied prospectively, not retroactively. In addition, the FCC has never preempted the intrastate access charge system.

In sum, there is no basis in the FCC's existing rules for Level 3's "Inserted CLEC" concept. Any such rules would be the product of rulemaking proceedings, and not of a declaratory ruling, as confirmed by the FCC's decision to not resolve Level 3's Petition on its own terms and instead place the Petition in two rulemaking proceedings. And, again, any new FCC rules would have prospective, not retrospective, application. Level 3 never explains what impact a hypothetical prospective rule would have on the present proceedings and, indeed, has acknowledged that until declared unlawful, Hypercube is not prohibited from collecting access

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[23] *See In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9948 ¶ 59, n.131, 2001 WL 435698 (2001) ("we conclude, on a prospective basis, that CLEC access rates will be deemed to be reasonable if they fall within the declining safe harbor that we have established"); *In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9117-18, ¶ 17 & n.60, 2004 WL 1103977 (2004) ("This new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis.") (citing 5 U.S.C. § 551(4); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

charges. *See* Ex. 10. Accordingly, Level 3's FCC Filing provides no basis for delaying this proceeding.

V. HYPERCUBE HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Because Level 3 has cited failure to state a claim in its Motion to Dismiss the Amended Complaint in a transparent attempt to latch onto Staff Response to Order No. 4, Hypercube must explain why the Staff Response does not correctly represent the state of the law. In short, the Staff Recommendation contains several erroneous factual assumptions and legal conclusions about the services provided by Hypercube that could only result from crediting Level 3's unproven allegations and erroneous arguments about the law. In short, Hypercube's service is perfectly legal and even Level 3 acknowledges that no current prohibition exists against Hypercube's service.

First, the Staff appears to incorrectly conclude that only one local exchange carrier ("LEC"), the ILEC, can be in the call path with an 8YY call that begins with a wireless carrier and ends with an IXC. The Staff Recommendation states that, "[i]f Hypercube is removed from the equation, the call would go from the commercial mobile radio service (CMRS) provider (the wireless carrier) to the ILEC, then to the IXC with the same result."[24] Staff does not explain whether or why CMRS carriers are obligated to route 8YY calls through an ILEC because there is no such obligation on CMRS carriers to route 8YY traffic through ILECs – wireless carriers are free to enter into whatever contracts they want to take traffic off their networks. Staff also

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[24] Commission Staff's Response to Order No. 4, at 2. Staff provided no citation for this assertion of fact, which Hypercube disputes. In fact, Exhibit B to Hypercube's Amended Complaint was a chart that identified several of the routes an 8YY call might go to reach the IXC. Moreover, as shown in Level 3's Texas Tariff, Level 3 occupies the same place as Hypercube in the call flow with its competing product. *See* Ex. 3, Level 3's Texas Tariff § 16, Call Flow Diagrams. Any number of carriers – Level 3, Sprint, TelCove, Verizon, or others – could take Hypercube's place in the call flow by winning business in the competitive market for tandem services.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HYPERCUBE, LLC, and HYPERCUBE TELECOM, LLC,	§	
	§	
Plaintiffs/Counterclaim Defendants,	§	
	§	**CIVIL NO. 3:08-CV-2298-G-AH**
v.	§	
	§	
COMTEL TELCOM ASSETS LP, D/B/A EXCEL TELECOMMUNICATIONS,	§	
	§	
Defendant/Counterclaim Plaintiff.	§	

HYPERCUBE'S RESPONSE TO EXCEL'S MOTION FOR PRIMARY JURISDICTION REFERRAL OF ITS OWN COUNTERCLAIM

Dated: November 3, 2009

Respectfully submitted,

/s/ Steven H. Thomas
Steven H. Thomas, Esq.
Texas State Bar No.: 19868890
McGuire, Craddock & Strother, P.C.
500 N. Akard, Suite 3550
Dallas, TX 75201
Telephone: (214) 954-6800
Fax: (214) 954-6868
E-mail: sthomas@mcslaw.com

Michael B. Hazzard, *pro hac vice*
DC Bar No.: 483737
Joseph P. Bowser, *pro hac vice*
DC Bar No.: 488665
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Telephone: (202) 857-6000
Fax: (202) 857-6395
E-mail: hazzard.michael@arentfox.com
E-mail: bowser.joseph@arentfox.com

Counsel for Plaintiffs

filed rates. *See, e.g., Maislin Indus.*, 497 U.S. at 129 ("We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule.").

B. Excel Has No Private Right Of Action For A Section 201(b) Claim The FCC Has Never Recognized

In addition to being barred by the filed tariff doctrine, Excel's section 201(b) "claim" is no claim at all because the FCC has never declared that anything Excel alleges is an unjust or unreasonable practice under section 201(b). Excel's motion is, in essence, a plea for *the creation* of a cause of action. Excel has it backwards; a party needs to have a cause of action before the Court can act on it. The Commission has never proclaimed, either by rule or order, that *any* of the practices alleged by Excel is unjust and unreasonable under § 201(b) (or any other provision of the Communications Act). To the contrary, the only relevant section 201 claim that the FCC *has* established here is the one that *Hypercube is prosecuting against Excel* for its unlawful refusal to pay Hypercube's tariffed rates. *See Seventh Report and Order*, 16 FCC Rcd ¶ 94 ("an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a)"); *In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 ¶ 61 (2004) ("*Eighth Report and Order*"). Unlike Hypercube, Excel has stated no cognizable claim for relief.

Excel seeks a referral to the FCC to ask the agency to declare for the first time that the following acts are unjust and unreasonable, and thus create new causes of action under section 201(b) (albeit on a prospective basis only, in accordance with the agency's rulemaking

authority[2]): "(a) Hypercube's practice of demanding that IXCs block calls; (b) Hypercube's payment of commissions to wireless carriers; (c) Hypercube's scheme of inserting itself unnecessarily in the calling path of wireless-originated 1-8XX calls; and (d) the rates Hypercube charges on interstate calls." Excel Mot. 2-3. None of these allegations state a cognizable claim against Hypercube.

In these allegations, Excel complains that Hypercube pays wireless carriers for access to their networks so that Hypercube can handle those carriers' customers' toll-free (or "8YY" or "8XX") traffic to the appropriate IXCs. Once Hypercube receives all of that traffic, it must undertake the necessary work to determine which toll-free numbers are associated with which IXCs so it can route them appropriately. The great majority of 8YY traffic that Hypercube carries is done in a dedicated fashion via direct connection pursuant to private agreements with those IXCs. For the residual 8YY traffic, Hypercube must transport those calls to an ILEC, which in turn transports the traffic to Excel and the other, smaller IXCs with which Hypercube is

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[2] *Cf. Eighth Report and Order*, 19 FCC Rcd ¶ 18 ("Accordingly, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff."). These changes must be prospective because, once their tariff rates and provisions become presumptively lawful after the appropriate notice period, they cannot conduct their affairs if the Commission could later declare certain provisions unjust or unreasonable, giving complainants essentially an indefinite statute of limitations for such complaints. Excel's new (and still unfiled) attack on section 2.8 ("Carrier Customer Termination of Service) of Hypercube's tariff is a perfect example. Those tariff provisions were filed with the Commission on April 18, 2001, and now, over eight years later, and in spite of the FCC's through route orders in the *Seventh and Eighth Report and Orders*, Excel wants those presumptively lawful provisions declared unlawful. Because retroactive relief would inescapably collide with the nondiscrimination requirements of 47 U.S.C. §§ 202(a) and 203(c) and the common law's filed tariff doctrine that implements those statutory provisions, it is unavailable. Congress provided for *FCC-ordered* refunds when tariff challenges are made promptly to any "new or revised charge, classification, regulation, or practice." 47 U.S.C. § 204(a). Excel's egregiously delayed complaint precludes it from retroactive relief. *See, e.g., ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

access their networks to deliver the calls to the IXCs with which Hypercube is not directly interconnected, such as Excel).

Thus, the wireless carriers are no different than the hotels and universities in the FCC's analysis above: because the network-access payments go to the wireless carriers (not their subscribers, the calling parties), there is no incentive for a caller to make more (or less) toll-free calls than she otherwise would. Excel never asserts otherwise. But in any event, because the CLECs' access charges must accord with the benchmarked rate, the FCC found that there is no harm to the IXCs. *See id.* ¶ 71 ("even if we were persuaded that there was an incentive for 8YY traffic generation, the fact that competitive LEC access rates are now subject to the declining benchmark should eliminate any harm to IXCs from this traffic.... Moreover, because access rates for 8YY traffic must be at or below the benchmark, inflated minutes of 8YY traffic would appear to benefit rather than burden IXCs.").

The Commission properly found that its holding promoted competition by CLECs, an overarching goal of Congress's 1996 amendments to the Communications Act. "[A]s the competitive LECs contend, the primary effect of the commission payments appears to be to create a financial incentive for the institutions [here, wireless carriers] to switch from the incumbent to a competitive service provider." *Id.* at ¶ 70. Indeed, the Commission recognized that to make those payments, it meant that the CLECs could be winning the business from ILECs by cutting into their margins: "a commission-paying competitive LEC [is] simply willing to have a lower profit margin." *Id.* ¶ 70 n.253. Thus, the FCC has carefully studied the issue that Excel here claims constitutes a section 201(b) violation, and found the practice lawful.

If Excel wants the FCC to reconsider or revise its rulemaking orders on CLEC access charges, it needs to follow the appropriate Administrative Procedures Act process by asking the

FCC to change its rules and establish new ones (which would only have prospective effect in any event).[7] Excel's section 201 challenge to an intermediate CLEC's access charges by virtue of the payments the CLEC makes to the non-calling-party is therefore barred as a matter of law.[8]

In short, Excel's "section 201(b) claims" fail to state a claim. They are an untimely, collateral effort to seek reconsideration of controlling FCC authority. Clearly, the Court cannot refer allegations that fail to state cognizable claims, notwithstanding Excel's wish that the law be different than it is. This case is already over a year old. At the same time Excel drags its feet on its discovery obligations, it files motions in this Court and jurisdictionally barred complaints at the FCC that are muddled in substance but clear in purpose: Excel is simply trying to drag out

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[7] Consistent with their quasi-legislative character, changes in agency rulemaking can only work prospectively. *See, e.g., Eighth Report and Order* ¶ 17 ("This new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis.") (citing 5 U.S.C. § 551(4); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Again, the agency has held that when a wireless carrier and CLEC interact to provide access services, the CLEC may charge the IXC its tariffed access charges for all the work it does. The FCC would need to reverse that holding to provide Excel the relief it seeks. Because it would change the clear law on which Hypercube reasonably relied, any relief Excel might receive from the FCC on these topics would have prospective effect only, leaving Hypercube's pending collection action ripe for summary adjudication based on the filed tariff doctrine. *See, e.g., Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996) ("The governing principle is that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'") (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

[8] Even if the Court were to find that Excel has pled around the agency's clear pronouncements, which establish that Hypercube is engaged in lawful conduct, and that it is in fact and law Excel that is engaged in section 201 violations, the agency's pronouncements are still sufficiently clear to guide the Court here such that the delay associated with any referral would be unduly prejudicial just to receive the agency's confirmation that its general rulemaking pronouncements apply to these unique facts that clearly fall within them. *See, e.g., Miss. Power & Light,* 532 F.2d at 419 (a primary jurisdiction referral is not appropriate "when the agency's position is sufficiently clear"); *AT&T Commc'ns of Sw.*, 8 F. Supp. 2d at 590 (denying request for primary jurisdiction referral in part because "the FCC has already issued opinions which set out its position on some of the issues raised in this case," and "[r]eferral to the FCC would lead to lengthy delays").

"the federal district court."); *see also Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 n.58 (2005) ("[t]he Commission has held that it does not act as a collection agent for carriers with respect to unpaid tariff charges"). And it is commonly acknowledged that agency action – whether on primary jurisdiction referrals or otherwise – poses serious delay that is inimical to Rule 1's admonition that actions be managed in a way that promotes their "just, speedy, and inexpensive determination." Fed. R. Civ. P. 1; *see also Nat'l Commc'ns Ass'n v. AT&T Co.*, 46 F.3d 220, 225 (2d Cir. 1995) (reversing district court's primary jurisdiction referral, in part because "[a]gency decisionmaking often takes a long time and the delay imposes enormous costs on individuals, society, and the legal system") (internal quotation and citation omitted); *Access Telecomm. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) ("We are always reluctant, however, to invoke the [primary jurisdiction] doctrine because added expense and undue delay may result."). The Court should therefore proceed to adjudicate Hypercube's affirmative claims for recovery under its filed tariffs.

CONCLUSION

Excel has failed to meet its burden that these claims are either cognizable in this Court, or that they should be referred to the FCC under the doctrine of primary jurisdiction. The Court should dismiss them, and proceed to adjudicate Hypercube's claims.

Dated: November 3, 2009

Respectfully submitted,

/s/ Steven H. Thomas

Steven H. Thomas, Esq.
Texas State Bar No.: 19868890
McGuire, Craddock & Strother, P.C.
500 N. Akard, Suite 3550
Dallas, TX 75201
Telephone: (214) 954-6800
Fax: (214) 954-6868
E-mail: sthomas@mcslaw.com